

Cooperative Agreements & Other Transactions Are Ways to Conduct Business with DoD in Addition to Traditional Research Contracts

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Difference between Assistance & Procurement

- ✧ Assistance instruments (Grants, Cooperative Agreements, and Other Transactions) are used when the primary purpose of the effort is to promote a public purpose.
- ✧ Procurement instruments (Contracts and Other Transactions for Prototypes) are used when the primary objective is to acquire services or goods for the direct use or benefit of the Government.
- ✧ Both assistance and procurement instruments may provide funds to a recipient and may require execution (signature) by a warranted contracting/grants officer.



Regulatory Framework

Assistance Instruments

- ✧ OMB Circulars
- ✧ DoD Grants and Agreements Regulations (DoDGARS)
- ✧ DDR&E Policy Memoranda on TIAs

Procurement Instruments

- ✧ Federal Acquisition Regulation (Applicable to Contracts)
- ✧ OUSD(ATL) Other Transactions Guide for Prototype Projects (Applicable to 845s)



Applicable Government-wide Statutes, Regulations & Policies

- ✧ Debarment and Suspension
- ✧ Drug Free Workplace
- ✧ Restrictions on Lobbying
- ✧ Non-Discrimination
- ✧ Environmental, Animal, & Human Subject Protection
- ✧ Military Recruiters on Campus (Domestic Colleges & Universities)



Tech Transfer Instruments Available to Industry

- ✦ Cooperative Research & Development Agreements (CRADAs)
- ✦ Other Transactions for Prototypes (845s)
- ✦ Technology Investment Agreements (TIAs)
- ✦ Cooperative Agreements (CAs)
- ✦ Other Transactions (OTs)



Cooperative Research & Development Agreements (CRADAs)

Established and authorized under the Federal Technology Transfer Act of 1986 as a vehicle to help improve the transfer of commercially useful technologies from federal laboratories to the private sector. CRADAs are legal instruments that allow one or more federal laboratories and/or one or more nonfederal entities to enter into an agreement to jointly conduct specified research-and development-related technology transfer activities that are consistent with the mission of the laboratory. A CRADA is not a procurement contract, a grant, a Cooperative Agreement, or an Other Transaction. Through CRADAs the federal laboratories can commit resources such as personnel, facilities, or equipment (with or without reimbursement), but not funds, to the nonfederal partners. Nonfederal CRADA partners can commit funds to the federal partners as well as the other resources listed above as part of the agreement.



Other Transactions for Prototypes (845s)

- ✦ The National Defense Authorization Act for Fiscal Year 1994 §845 augmented 10 U.S.C. §2371 to allow the use of "other transactions" for prototype projects directly relevant to weapon systems proposed to be acquired or developed by DoD.
- ✦ These "845 other transactions," also known as "other transactions for prototypes," are used for acquisition purposes and are subject to rules promulgated by the Director of Defense Procurement.
- ✦ Policy guidance is contained in USD(ATL) issued "Other Transactions (OT)" Guide for Prototype Projects dated January 2001. Changes to the rules were published in the Federal Register on November 26, 2001.



Technology Investment Agreement (TIA)

- ✦ TIAs are assistance instruments used to stimulate or support research. A TIA may be either a cooperative agreement or an OT authorized by 10 U.S.C. §2371.
- ✦ TIAs can be used to carry out basic, applied, or advanced research projects whenever it is appropriate to use assistance instruments, the research is to be performed at least in part by a for-profit firm, and the activity to be performed fosters civil-military integration (i.e., dual use).



Cooperative Agreement

As defined in the Federal Grant and Cooperative Agreement Act (31 U.S.C. §6305), a cooperative agreement is a legal instrument used by a Federal agency to enter into a relationship the principal purpose of which is the transfer of something of value (including funds) to the recipient to carry out a public purpose of support or stimulation authorized by U.S. law when substantial involvement of the Government is anticipated in carrying out the agreement activity.



Other Transaction (OT)

"Other transaction" is a shorthand expression used to refer to any instrument (authorized by 10 U.S.C. §2371) that is other than a procurement contract, grant, or cooperative agreement. The authority's primary purpose is to help broaden DoD's technology and industrial base by allowing development and use of instruments that reduce barriers to participation in defense research by commercial firms. The format of a cooperative agreement is commonly used for an Other Transaction (OT) agreement.



Statutory Basis of OTs

10 U.S.C. §2371

- ✦ Authorizes the use of transactions (other than contracts, cooperative agreements, and grants) in carrying out basic, applied, and advanced research projects as well as some prototypes.
- ✦ Provides for use of advance payment provisions.
- ✦ Allows recovery of funds provisions.
- ✦ Requires cost-share from the non-government parties to the extent practicable.



Primary Purpose of OTs

Encourages participation by commercial firms and others who do not traditionally do business with DoD by increasing flexibility in negotiating provisions for certain “problem areas” (e.g., intellectual property rights, applicability of cost accounting standards, determination of allowable costs and audit requirements, and Government access to records requirements).



What standards apply?

- ✦ Award must be made to a legal entity.
- ✦ Requirement for determining a fair and reasonable cost/cost share for the effort.
- ✦ Ensuring the Government's benefits match the contributions (funds) provided.
- ✦ Prudent use of authorized flexibility.
- ✦ Compliance with all applicable statutes, regulations, and policy requirements.



Award Must be Made to a Legal Entity

- ✧ Awards to consortiums, partnerships, joint ventures, etc., is encouraged.
- ✧ The actual recipient must be a legal entity in order for the Government to be able to enforce its rights under the agreement.
- ✧ Usual method to accommodate this is to have the recipient group specify in their Articles of Collaboration that the named recipient is designated as the party legally authorized to execute the award on behalf of the group.
- ✧ Alternative methods include having each member of the group execute the agreement and modifications. 14



Determining a Fair & Reasonable Cost/Share Ratio

- ✧ Truth in Negotiations Act does not apply to assistance instruments which eliminates the requirement for certified cost & pricing data.
- ✧ Cost reasonableness is usually determined based on price analysis techniques without audit of the proposal.
- ✧ Cost share is to be determined based on the perceived benefits (present & future) of the parties as well as the parties' financial ability to contribute.



Gov't Benefits should Reflect the Funding Contributed

- ✦ Intellectual property rights, as the primary source of benefits to the parties, are negotiable.
- ✦ If the Government contributes most or all of the funding, then the results, including intellectual property rights, should reflect this.
- ✦ Conversely, if the Recipient contributes a significant amount of both past and current funding to the effort, then rights to the Government would likely be reduced.



Prudent Use of Authorized Flexibility

- ✦ 10 U.S.C. §2371 was intended to be used only in those circumstances when the use of a standard grant, contract, or cooperative agreement is not appropriate. [U.S. Senate Report 101-81, (SASC) pp. 126-27]
- ✦ Annual congressional reporting requirements include documentation as to the justification for issuance of each OT.



Key Issues for Negotiation

- ✧ Goals or Objectives to be Achieved
- ✧ Measures of Success (e.g., Milestones)
- ✧ Program Management Structure
- ✧ Intellectual Property Rights
- ✧ Cost Principles & Audit/Records Access
- ✧ Foreign Access to Technology
- ✧ Payments & Use of any Program Income



Goals or Objectives to be Achieved

- ✧ Important to determine the scope of the effort planned and authorized.
- ✧ Explains the parties interests and motivations in case of future disputes.
- ✧ Provides a top level measure of performance of success and completion of the effort.



Measures of Success

- ✦ Detailed measures of success are important to assess progress of the work.
- ✦ In a research environment, it is often important to know what doesn't work as much as it is to know what does work.
- ✦ Clear measures of success or milestones can be the basis for payments to recipients.



Program Management Structure

- ✦ Should document the degree of Government involvement in the conduct of the research.
- ✦ Need to clearly specify what actions are subject to Government approval.
- ✦ Need to specify how the Government plans to monitor performance.
- ✦ Should not create a situation where the Government, through its management structure, assumes liability for the research.



Intellectual Property Rights - Data

- ✧ Starting point is to get an irrevocable, world-wide license to use, modify, reproduce, release or disclose data for Gov't purposes.
- ✧ Negotiation should be based on:
 - **Anticipated need for data and its use**
 - **Commercial potential of the technology**
 - **Effects of background data that may be necessary to utilize the technology/information**
 - **Contributions of the parties and costs of future data acquisition through negotiated options**



Intellectual Property Rights - Patents/Inventions

- ✦ Starting point is Bayh-Dole (Including Gov't Purpose Rights).
- ✦ Negotiations are based on:
 - Future requirements for DoD use and commercial market potential
 - Contributions of the parties to this and prior supporting research
 - Costs of deferring acquisition through options



Cost Principles

- ✦ Should specify what standards are to be used to determine allowability, allocability, and reasonableness of costs.
- ✦ Usually is based on the type of Recipient.
- ✦ May be negotiated, if the nature of the Recipient warrants (e.g., commercial firm with no other Government awards not subject to CAS).



Audits

- ✧ Whether or not audits will be performed, by whom, and the audit scope must be specified in the award.
- ✧ In cases where payments are based on costs incurred or there are statutory requirements for cost share an audit is mandated by DoD policy.
- ✧ The use of Independent Public Accounts (IPAs) may be authorized as an alternative to DCAA audits when the recipient is not currently CAS covered.



Audits

- ✦ Any recipient who already grants access to DCAA as a result of other CAS covered awards must provide the same level of access to DCAA for all Gov't awards.
- ✦ The Single Audit Act (OMB Circular A-133) requirement applies to all university, non-profit and state/local government recipients who expend more than \$300k annually in federal awards.



Records Access

- ✧ For all cooperative agreements (regardless of recipient) and OTs with non-profits, the standard DoDGARS access to records requirement 32 CFR 32.53(e) applies.
- ✧ For OTs with for-profit institutions with no other federal awards under which access is granted, there is no mandatory requirement for access; however, if the agreement provides for audits by IPAs the Government must be granted access to the IPA's reports and working papers.



Records Access

- ✦ In all awards, regardless of award type or the recipient, if access is granted to any Government official then the DoD-IG automatically receives the same access rights.
- ✦ All 845 agreements in which Government contributions exceed \$5M must include a clause providing Comptroller General access to the records for any entity that participates in performance of the agreement.



Foreign Access to Technology

- ✧ Part 37 of DoDGARS provides that all TIAs must include a provision concerning foreign access to technology.
- ✧ The mandated provision must include a requirement that any exclusive license to use or sell the technology in the U.S. must include a requirement that manufacture take place substantially within the U.S. unless a waiver is granted.



Payments

- ✧ Payments may be made on an advance basis when the conditions specified for authorizing advances are met.
- ✧ Payments may be made on a reimbursable basis provided the recipient's financial systems are adequate to document expenditures.
- ✧ Payments may be made on a fixed or milestone basis with amounts determined in advance based on estimated costs to achieve specific technical milestones.



Program Income

- ✧ Authorized under the Recovery of Funds provision of 10 U.S.C. §2371(d).
- ✧ Used primarily to enable the Government to recoup a portion of its investment in new technology where the recipient stands to gain significant financial benefits.
- ✧ The provision allows for crediting such funds into treasury accounts set up for DoD.
- ✧ ONR currently uses the provision to recoup funds within an award to fund more research.



Present DoD Focus

- ✧ Issuance of DoDGARS Part 37.
- ✧ Expanded use of Fixed Support Agreements.
- ✧ Expanded rules for use of “Non-Traditional” Instruments.



Issuance of DoDGARS Part 37

- ✦ Part 37 governs the use of TIAs.
- ✦ Proposed rule was published in the Federal Register on April 30, 2002.
- ✦ Public comments were submitted by July 1, 2002.
- ✦ Areas of comment/concern were audit and access to records requirements.



Use of Fixed Support Agreements

- ✦ Eliminates requirement for financial audits.
- ✦ Most appropriate when Government is not the primary source of funds or when costs can be readily/accurately estimated.
- ✦ Usually requires the use of clearly defined technical milestones to facilitate payment and monitor performance.
- ✦ Must satisfy the criteria for use of an assistance instrument.



Expanded Rules for Use of Non-Traditional Instruments

- ✦ DoD-IG, GAO, Congress, etc. continue to explore the use of these instruments and the justifications and rationale to support their use.
- ✦ Limiting use by traditional DoD performers is already a factor in 845s and will likely expand in the OT and TIA areas.
- ✦ Competition and cost sharing requirements are likely areas for regulators to “further define” the Congressional intent of existing provisions.



SUMMARY

- ✧ CRADAs and Cooperative Agreements are tech transfer instruments but differ in who can sign them and whether funds can be transferred to recipients by the instrument.
- ✧ Cooperative Agreements provide funds.
- ✧ An OT is a step beyond a Cooperative Agreement and allows some flexibility in negotiating Intellectual Property Rights.
- ✧ Both Cooperative Agreements and OTs require warranted contracting or agreements officers' signatures.